

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

In the Matter of the Application
of McDonough Truck Line, Inc. for
Extension of Its Regular Route
Common Carrier Certificate to
Transport General Commodities
Over Various Routes in the
state of Minnesota.

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above entitled matter came on for hearing before
Administrative law
Judge Richard C. Luis in June and July of 1981, on the following dates in the
following locations: June 1, 2 and 22 in South St. Paul; June 3 and 4
in
Faribault; June 23 and 24 in Owatonna; and June 25, July 17 and July
20 in
Minneapolis. The record in this matter closed on January 15, 1988.

Grant J. Merritt, Esq., Grant Merritt & Associates, 4644 IDS Center,
Minneapolis, Minnesota 55402, appeared on behalf of McDonough Truck Line,
Inc.
("Applicant", "Petitioner"). Robert D. Gisvold, Esq., Mackall,
Crounse &
Moore, 1600 TCF lower, 121 South Eight Street, Minneapolis, Minnesota 55402,
appeared on behalf of Protestant Hyman Freightways, Inc. ("Hyman",
"HE").
Brenl L. Reihert, Esq., Robins, Welle, Larson & Kaplan, 1800
International
Centee, 900 Second Avenue South, Minneapolis, Minnesota 55402,
appeared on
behalf of Protestant lakeville Motor Express ("Lakeville", "LME"). The
Application was also protested by Robinson Transfer, 204 East 15th
Street,
Hastings, Minnesota 55033. By letter filed with the Administrative Law Judge
on June 19, 1987, Robinson Transfer withdrew its Protest.

Notice is hereby given that, pursuant to Minn. Stat. 14.61, and
the
Rules of Practice of the Public utilities Commission, as applicable to
the
Transportation Regulation Board, and the Rules of the Office of
Administrative
Hearings, exceptions to this Report, if any, by any party adversely
affected
must be filed within 20 days of the mailing date hereof with the
Transportation

Regulation Board, Minnesota Administrative Truck Center, 254 Livestock Exchange Building, 100 Stockyards Road, South St. Paul, Minnesota 55075.

Exceptions

must be specific and stated and numbered separately. Proposed

Findings of

fact, Conclusions and Order should be included, and copies thereof shall be

served upon all parties. If desired, a reply to exceptions may be filed and

served within ten days after the service of the exceptions to which reply is

made. Oral argument before a majority of the Board may be permitted to all

parties adversely affected by the Administrative Law Judge's recommendation

who request such argument. Such request must accompany the filed exceptions

or reply, in an original and five copies of each document must be filed with

the Board.

The Minnesota Transportation Regulation Board will make the final determination of the matter after the expiration of the period for filing

exceptions as set forth above, or after oral argument, if such is requested

and heard in the matter.

Further notice is hereby given that the Board may, at its own discretion, accept or reject the Administrative Law Judge's recommendation and that said recommendation has no legal effect unless expressly adopted by the Board as its final order.

STATEMENT OF ISSUE

Whether the Applicant should be granted authority to provide services as a Regular Route Common Carrier (RRCC) over various named routes, pursuant to Minn. Stat. 221.071 (1986).

Based upon all of the proceedings herein, the Administrative law Judge makes the following:

FINDINGS OF FACT

1. On March 6, 1987, McDonough Truck Line, Inc. filed a Petition for extension of its Regular Route Common Carrier Certificate to transport general commodities over 12 specified routes in Minnesota.

2. Notice of the Petition was published in the Transportation Regulation Board's (Board) weekly calendar, with a Protest deadline set of March 26, 1987. Timely Protests were filed by Hyman, Lakeville and Robinson. Robinson's Protest was withdrawn on June 19, 1987, and Hyman and Lakeville remain as Protestants in this case.

3. McDonough currently has RRCC authority to serve the Minneapolis-St. Paul "Intrastate Freight Zone" (interpreted by the Administrative Law Judge and all parties hereto as the Seven-County Metropolitan Area of Hennepin, Ramsey, Anoka, Washington, Dakota, Scott and Carver Counties) and all points in the counties of Rice and Steele.

The Petitioner is based in Faribault, Minnesota, and the extension it seeks in this case includes the area within a 50-mile radius of that city which lies outside Rice and Steele Counties (for which McDonough already has RRCC authority). The basic borderlines of the territory are the Minnesota River, down to Mankato on the west, south to Wells from Mankato on the southwest, Interstate 90 between Alden and Chester as the southern boundary, State Highway 42 North from Chester to the Wabasha County line, then east along the southeastern border of Wabasha County to the Mississippi River on the southeast, and the Mississippi River (the Minnesota-Wisconsin state line) as the eastern boundary. The general area is depicted on McDonough's Exhibit No. 2.

4. The 12 routes specifically identified in the Petition essentially "spider web" the area described in the preceding Finding outside of the already authorized counties of Rice and Steele. The routes run basically north and south, with U.S. Highway 14 between Rochester and Mankato (McDonough Route 7) and parts of 1-90 (McDonough Routes 12 and 9) as the only east-to-west routes. The major east to-west connecting routes omitted in the Petition are State Highway 60 between Wahas and Mankato (through Iarhaul) State Highway 30 between 1-90 south of Rochester and Highway 22 south of Mapleton, and State Highway 19 between Highway 61 west of Red Wing and the Minnesota River near Henderson. It is McDonough's position that all points on or near these routes can, however, be served on a regular route basis as

intermediate and off-route points of the 12 routes it specifically describes in the Petition. This result is aided by a provision in the Petition allowing tacking of all 12 described routes with each other and with the Petitioner's existing authority to provide direct service. The 12 routes (without naming all listed intermediate and off-route points) are:

- (1) Between the Minneapolis-St. Paul Metropolitan (Metro) area (described as the seven counties of Hennepin, Ramsey, Anoka, Washington, Dakota, Scott and Carver) and Albert Lea over 1-35;
- (2) Between the Metro area and Mankato via U.S. Highway 169;
- (3) Between the Metro area and Austin via 1-35 to Owatonna, U.S. Highway 14 and U.S. Highway 218;
- (4) Between the Metro area and Rochester via U.S. Highway 52;
- (5) Between the Metro area and Wabasha via U.S. Highway 61;
- (b) Between Hader (on U.S. 52) and Kasson (on U.S. 14) on State Highway 57 (intermediate points are Wanamingo and Mantorville);
- (7) Between Rochester and Mankato on U.S. Highway 14 (chief intermediate points are Owatonna and Waseca);
- (8) Between Jordan and Albert Lea on State Highways 21 and 13 (chief intermediate points are New Prague and Waseca);
- (9) Between Hampton (at U.S. 52) and Austin on State Highway 56 and i-90 (chief intermediate points are Kenyon and Dodge Center);
- (10) Between Rochester and Lake City on U.S. Highway 63;
- (11) Between Wumbrota and Red Wing on Minnesota Highway 58 (chief intermediate point is Goodhue); and
- (12) Between Mankato and Albert Lea over Minnesota Highway 22 and 1-90 (chief intermediate point is Wells).

5. McDonough Trucking, Inc. is a closely-held family corporation owned by Richard E. McDonough (its President and Treasurer) and his wife, Charlotte E. McDonough (the Vice President and Secretary). The corporate

address , 31 05 1 inustri a l Drive in F a ri ha u It, Minnesota, is a I so
the locat ion
of McDonough's terminal, garage area and offices. Both McDonoughs
participate
in the day -to -day opera t ion (Richard McDonough sti II a c Is as a
driver) , and
several family members are included among the 20 full-time
employees of the
enterprise.

6. The McDonoughs began in the trucking business in 1961, when they
purc ha sed the business of a loc a I livestock ha u Ier and transported
livestock
to South St Paul from the Faribault, Austin and Albert lea
areas, bringing
back freight.

In 1973, the McDonoughs merged their business with that of
Palan Truck
Line, Inc., a corporation owned by Ed and Shirley Palan. The McDonoughs

became partners with the Palans in 1971 and bought them out by the end of 1980. On January 6, 1981, the Minnesota Public Service Commission authorized a change in the name of the Palan business to McDonough Truck Line, Inc. and transferred a portion of the Palan authority (Regular Route Common Carrier, Interstate Common Carrier, Livestock, and Local Common Carrier) to McDonough.

7. In addition to the authorities transferred from Palan mentioned in the preceding Finding, one of the authorities transferred on January 6, 1981 was Palan's "grandfathered" Irregular Route Common Carrier authority to transport general commodities statewide. The originally transferred Regular Route Common Carrier authority has had two extensions--one to the Northfield area (which gave McDonough Regular Route authority throughout Rice County) and one to Steele County.

8. McDonough's equipment, for vehicular and communications operations, is listed in detail in Exhibits 4, 4A and 5. The Company operates three sales cars, five smaller trucks, 11 tractors, three 45 foot trailers, three flatbed trailers over 40 feet in length, six 48' x 102" trailers (three of which are leased), four dry vans (28' x 102"), one refrigerated truck and three forklifts.

9. Some of McDonough's trucks have 110" high door openings, powered lift gates and ramps, all of which aid in the loading and unloading of freight. If needed at the site where freight is located, the Company transports one of its forklifts in the back of trailer to the freight's location. The Company offers less than truck load (LTL) flatbed service and will store freezable freight at its Faribault terminal (which has six dock doors and can hold ten truckloads of freight) overnight or on any weekend. Many of McDonough's customers have appreciated these services in the past.

10. McDonough has radio contact from its dispatcher located in Faribault with all of its tractors (the radios and other communications equipment used by the Applicant in its operations are listed in detail at Exhibit 5). The transmission range of these radios is enhanced by the Company's having purchased "repeater" power at radio antennas located in St. Paul, Faribault and Owatonna. The deployment of these repeaters gives McDonough the

capability of direct radio contact with all of its drivers within a 50-mile radius of Faribault (the rough boundary of the area for which extension of Reg u I a r Route Common Carrier authority is sought in th is Appli cat ion).

McDonough's range of direct radio communication capability exceeds that of the Protestants, whose drivers are equipped with radio only in the Twin Cities area. Hyman and Lakeville drivers operating outside the Twin Cities, in areas such as that sought for extension of McDonough's authority, must communicate with their dispatchers by telephone (which they generally do only after completion of assigned runs or at set time intervals). LME drivers on peddle runs from Roseville into a portion of the territory bought by McDonough are equipped with radios in I hei r vehic I es, but the range of the r adios is more limited than that of McDonough's.

11. McDonough presented testimony in this proceeding from 27 different shipper witness es, whose evidence regarding need for common carrier truck ing services is detailed in subsequent Findings. Several of these witnesses have received a benefit from McDonough's communication system, which is described in the preceding Finding. The incidents involve situations where the shippers

were in "emergency" circumstances that required pick up or delivery of Particular freight the Same day. The incidents were resolved when McDonough's dispatcher was able to communicate by radio directly to a driver who was making pick ups and deliveries in the vicinity where the shipper's supplier was located. The driver, after being instructed by the dispatcher, was able to add a stop at the supplier's establishment before leaving the (Twin Cities) area, and the customer's freight was hauled back to McDonough's Faribault terminal. The freight was then moved on another truck to the customer's location, or picked up by the customer.

At least two such incidents involved radio communication to a truck that had already left the Twin Cities and was then turned around and sent back to the supplier's establishment. McDonough's policy in such situations is to send back any Twin Cities delivery truck that has not reached State Highway 50, in Dakota County near Lakeville. On some occasions, when a shipper has had need for instant delivery or freight from the Twin Cities and all of McDonough's trucks have already finished their Twin Cities runs for the day, the Applicant has dispatched another vehicle from Faribault to accomplish the shipment.

12. McDonough generally sends four to six trucks per day for pick up and delivery in the Twin Cities area. Two of these trucks peddle freight to and from the Twin Cities, one going northeast through Northfield, Farmington and Rosemount, and the other northwest through Lonsdale, New Prague and Prior Lake. The Company conducts daily peddle runs in the Faribault and Owatonna areas (these trucks are dispatched to the Twin Cities for pickups after covering their local assignments), and also sends trucks on a daily basis to the Mankato and Rochester areas. On an occasional basis, the Applicant sends trucks for a full day run to the Austin Albert Lea and Red Wing areas.

13. Mankato, Rochester, Austin, Albert Lea and Red Wing are all outside the area where McDonough has Regular Route Common Carrier authority. The trucks utilized in pickup and delivery to these areas frequently contain freight that is being delivered under the Petitioner's Regular Route Common Carrier authority, so, on such occasions, McDonough is "commingling" Regular and Irregular Route freight.

14. On other occasions, freight bound for the Twin Cities from Mankato, Rochester, Austin, Albert Lea and Red Wing (or any other point outside the

counties where McDonough is authorized to provide Regular Route service) is returned to Faribault and placed on trucks carrying freight to the Twin Cities under McDonough's Regular Route authority. In effect, the Applicant in such situations is commingling Regular Route and Irregular Route freight and also "interlining" Regular Route and Irregular Route freight with itself.

In addition, McDonough sometimes picks up freight delivered to Twin Cities terminals by Regular Route Common Carriers that is bound for areas outside the counties in which it has Regular Route Common Carrier authority by (places such as Rochester, Mankato, Austin, Red Wing and Albert Lea). When it delivers such freight, picked up in the Twin Cities from Regular Route carriers, the Petitioner is, in effect, acting as an Irregular Route carrier that is interlining freight with a Regular Route carrier.

15. Exhibits 6 and I show McDonough's balance sheets and income statements, respectively, for calendar years 1985 and 1986. As of

December 31, 1986, the Applicant had \$261,047 in total assets (of which \$116,269 are current assets), \$77,694 in current liabilities and stockholders' equity of \$183,353, of which \$148,408 was retained earnings. The retained earnings had grown by over \$24,000 since December 31, 1985.

The Company's net income after taxes increased from \$21,361 in 1985 to \$25,540 in 1986.

16. McDonough currently offers same-day service. Approximately 20 to 25 percent of its shipments are handled the same day. If this Application is granted, McDonough intends to offer same-day service throughout the entire area shown on Exhibit 2. The Company would hire an employee to be based in Mankato, another one for the Austin-Albert Lea area and another one located in Rochester. It is anticipated that additional employees would also be needed in the Twin Cities area, with the possibility of one employee based in Red Wing.

17. Approximately ten percent of McDonough's revenues come from freight that has been "interlined" with freight from another carrier. This process involves delivery to or pickup at the terminals of other carriers of freight the other carrier has transported from somewhere outside McDonough's service territory. McDonough delivers (or picks up) the freight to/from customers in its service territory. Generally, payment is made for the entire shipment to one carrier or another, who then must reimburse the other carrier for its portion of the total delivery fee. McDonough frequently interlines freight with the Protestants in this case. Its past experience with Hyman and Lakeville in this regard has been satisfactory to all concerned, and the interlining among the carriers is expected to continue in the future, regardless of the outcome of this proceeding.

18. If this Application is granted, McDonough intends to provide Regular Route Common Carrier service according to the following schedules:

Route 1: Northfield area, inbound to Twin Cities for local pickups.

Route 2: "West side" deliveries to Lonsdale, Montgomery, New Prague and Jordan, deliveries inbound to Twin Cities for local pickups.

Route--3: Faribault area deliveries, inbound to Twin
Cities for LtL
pickups.

Route 4 : Owatonna area deliveries, inbound to Twin
Cities for LTL
p i c k u p s .

Route 5: Waseca, Mankato, St. Peter area deliveries,
redispatched
for southwestern area pickups.

R oute 6: Dodge Center, Rochester area deliveries,
redispatched for
southeastern area pickups.

Route 7 : Austin, Albert Lea area deliveries, redispatched for
southern area pickups.

Route 8: Cannon Falls, Red Wing, Hastings
deliveries, redispatched
for eastern Minnesota pickups.

McDonough's drivers would leave the Faribault terminal between 6:00 a.m. and 8:00 a.m. and have loads unloaded by 11:00 a.m. (approximately). After unloading they would be redispached to pick up freight in the area they are serving.

19. Vincent Metals is a service center for the metal industries. The corporate office and a warehouse are located in Minneapolis, and the company also has warehouses in Afton and Little Canada, Minnesota. Vincent ships a variety of products used in the metals industries, from small packages up to truckloads in coil form and materials on skids and Pallets. Most of the shipping done for them by McDonough is done on flatbed trailers. The company had \$4 million in freight charges in 1986 and has been growing continuously. It issued 27,000 freight bills in 1986.

Vincent Metals has chosen McDonough and Quast as its preferred carriers to the points in the territory proposed to be served by McDonough if this Application is granted. During the six months before the hearing, Vincent used McDonough for shipments to Owatonna (approximately three times per week), St. Peter (twice a month), Cannon Falls (twice a month), Rochester (ten times per month), Mankato (once a week), Faribault ("frequently"), Waseca (once a month) and Montgomery (two to three times per week).

If this Application is granted, Vincent intends to use McDonough to ship to Pine Island (once or twice per month), Austin (two to three times per month), Lumbrota (two to three times per month), Oronoco (one to two times per month), LeSueur (two to three times per month), Belle Plaine (two to three times per month), LeCenter (once or twice per month) and Red Wing (once or twice per month).

Most of the shipments McDonough makes for Vincent are LTL. Vincent rates McDonough's service as "fantastic".

20. The Russ E. Smith Company sells heavy duty truck and trailer parts and equipment. Its sales are growing at 10% per year. The company currently uses McDonough for shipments once per week to Northfield and twice a month to

Owatonna and Faribault. If this application is granted, the company will use McDonough for shipments to Rochester, Red Wing, Winona, frontenac, Wanamingo

o Mankato. Russ E. Smith's common carrier transport needs are irregular in nature, with the need arising whenever a piece of heavy equipment breaks down

id needs a new part. Most of the company's shipments are part of weekly runs in which Smith's own sales people deliver ordered parts to truck fleets, independent haulers and repair shops. The need for the services of a

common carrier arises in emergency situations. The number of occasions when

the need for emergency part delivery service will arise in the area sought for

service in this Petition is unpredictable. Russ F. Smith has been very satisfied with McDonough's same-day service out of its Eagan office.

21. Tricker Caster and Wheel Sales distributes industrial casters and wheels that are manufactured by Albion industries in Michigan. Eighty percent

of the company's sales go by UPS, but shipments of 100 or more caster rigs go

by common carrier, equalling 20% of the sales. Tricker uses McDonough for

shipments to Albert Lea once every two months and Wells once a month.

If this

application is granted, Tricker will use McDonough to deliver to potential

customers in Red Wing and Mankato, but the record does not indicate the

frequency of such proposed usage. This shipper is very pleased with McDonough's same-day service.

22. Faribo Woolen Mills manufactures blankets, throw rugs, afghans and stadium robes, which it distributes on a national basis. The company grossed \$15 million in sales in 1986 and has 175 employees. Sixty percent of its business is "retail", the shipments for which are made to department stores around the United States. Forty percent is in the Company's "specialty market" area, for sales to airlines and companies or organizations that distribute its products as premiums, incentives or holiday gifts.

This shipper uses McDonough to transport its products to the Twin Cities approximately 5 times per week from Faribault. It also uses McDonough for shipments to its outlet store in Red Wing once a week. Finally, McDonough has been used at least once a week for LTL shipments of its products for premium promotions at some location (most often Mankato or Owatonna) within the area proposed for extended service in this Application.

Faribo Woolen Mills is unable to predict how much business, over and above that already done by McDonough, will be given to the Applicant if this Application is granted. It is very pleased with McDonough's service.

33. Matejcek implement Company, located in Faribault, sells farm equipment, trucks and the supplies and parts for those vehicles. The company has dealers scattered throughout the area sought to be served if this Application is granted, and also supplies Minnesota Department of Transportation maintenance facilities in Dodge Center, Rochester, Austin, Albert Lea and Mankato. McDonough has delivered some of Matejcek's supply shipments to the Department of Transportation offices. Most of its deliveries, particularly to the dealers it services, are made by Matejcek's private fleet. Matejcek intends to continue using McDonough for shipments to the Department of Transportation offices regardless of the outcome of this Petition. They frequently use the Applicant for interstate shipments, and, as a Faribault business, are familiar with McDonough's reputation in the community (which is excellent).

24. Met-Con Construction, Inc. is a Faribault company whose headquarters building is shared by McDonough. Tom McDonough, Richard McDonough's brother, is President of Met-Con. Met-Con is a general contractor for the building of commercial, industrial and some residential buildings. They supply a variety of materials that go into construction jobs and do some subcontracting.

McDonough carries 99% of Met-Con's intrastate shipments by common carrier. Its trucks generally move parts from the Metropolitan area to Fairbault, and then to job sites scattered throughout the proposed service area on a daily basis. Met Con has also used McDonough to transport parts from Mankato, Rochester, Dodge Center and Albert Lea to job sites throughout the proposed service area. This business will continue whether or not the present Application is granted. The record does not reveal how often McDonough ships products for Met-Con from the Twin Cities area to locations throughout the area sought for extended service. Although there is evidence of "cross-shipment" within the area (for instance, between Rochester and Mankato), there is no quantification of the volume of such shipping.

25. Plastic Profiles, Inc., of Cannon Falls manufactures window stripping and molding. It currently uses McDonough on shipments from Cannon Falls to

Mankato and the Twin Cities approximately twice per month. If this Application is granted, Plastic Profiles intends to use McDonough for shipments to anywhere in the area proposed for service where they may add a customer. There is no quantification in the record of the amount of increased business anticipated, but this shipper prefers to use McDonough because of its friendly drivers, on-time service, and lack of complaints by any consignees.

26. Mercury Minnesota, Inc., located in Faribault, is a subsidiary of Mercury Aircraft, which is headquartered in Hammondsport, New York. Mercury Minnesota distributes computer frames and ships sheet metal for computer component parts. Thirty percent of its shipments are intrastate, most of which are hauled by their own trucks. Any overflow freight goes by common carrier.

McDonough is utilized for some of Mercury's overflow outbound shipments and on inbound shipments of parts from the Twin Cities. McDonough currently handles Mercury's shipments to IBM in Rochester approximately twice per month, and also has been utilized for shipments of plating material to Pine Island. If this Application is granted, McDonough will be utilized for overflow outbound shipments to anywhere in the area sought for extended service. As of now, Mercury foresees possible shipments to vendors in Mankato and Waseca, but the amount and frequency of such shipments are not quantified on the record. Mercury is very pleased with McDonough's service, particularly with the availability of same-day service.

27. Foldcraft Company of Kenyon, Minnesota produces folding chairs and Dr!mar i ly) booths and other furniture for deployment in fast food restaurants. Most (98%) of this company's common carrier shipments are interstate. Within Minnesota, the company generally uses Hyman, one of the Protestants herein. Most of Foldcraft's use of McDonough has been to haul steel to Kenyon from Owatonna or the Twin Cities area. The record contains no quantification of the frequency of such shipments, which are generally handled in full truckloads on one of McDonough's flatbeds.

28. Energy Sales, Inc., is headquartered in Burnsville and has a

warehouse in Faribault. The company is a manufacturer's representative for Roberts Gordon of Buffalo, New York, which produces infrared heating systems. The products shipped by Energy Sales include burners, accessories, reflectors, controls, vacuum pumps and steel tubing. Energy Sales relies on common carriers for outbound shipping. It rates McDonough's service as very good because McDonough is available for same-day service when needed and there have been no claims of damage from any consignees. Energy Sales uses McDonough approximately once per day to the area sought for expansion in this Application. The shipments are LTL in volume and the destinations vary throughout the territory. If this Application is granted, this shipper intends to use McDonough for shipments to Mankato approximately 5 to 10 times per year and to Esueur approximately twice a year.

Energy Sales currently uses the Applicant for moving all of its products to the Twin Cities, where the shipments are interlined with carriers that serve Parts of Minnesota not served on a regular basis by McDonough. Some of these loads are I !: , and others constitute full truck loads .

29. Humphrey Elevator and Truck Company, Inc., of Faribault is a manufacturer of Mdnlifts and bag lifting devices that are deployed in grain

elevators, Mills, and industrial plants. They supply customers with replacement parts as needed. Humphrey currently uses McDonough on outbound shipments to Hastings and Red Wing (two to three times per year each). If this Application is granted, Humphrey will use McDonough on shipments to LeSueur approximately twice per year and may use the Applicant for shipment of castings from Mankato that are currently being hauled by Humphrey's own truck. The frequency of shipments from Mankato is approximately 5 to 10 times per year. Humphrey considers McDonough's service to be good.

30. S. Cohn and Son Auto Company, Inc. of Faribault, Minnesota is a supplier of parts for heavy construction equipment and mining equipment. Specifically, S. Cohn distributes under-carriage parts for such machines. During the year before the hearing, McDonough was used by S. Cohn for shipment of replacement parts to Mankato and to a community in the eastern part of the area sought for expanded service. This shipper is impressed with McDonough's same-day and emergency service, and its experience with Protestants Hyman and Lakeville in that regard is that they are unable to provide the same quality of service as the Petitioner. S. Cohn rates McDonough as a "10" on a scale of 1 to 10. Most of S. Cohn's utilization of McDonough has been between Faribault and the Twin Cities.

31. Faribo Air Conditioning and Heating of Faribault installs and services commercial, residential and industrial heating systems, air conditioners and plumbing systems. They sell and service Carrier products. This shipper uses McDonough frequently on shipments between its supplier in Bloomington and its office in Faribault. It has also used McDonough for shipments to job sites at Mankato and Austin and, if this Application is granted, intends to use McDonough on an "as needed" basis to any of 10 to 15 job sites that it may be servicing at any point in time in the area proposed for expansion of authority. The record does not contain a quantification of the number of times McDonough has been used in the territory sought, nor as to the location and quantity of shipments if the Application is granted.

32. Malt-O-Meal, a producer of hot and cold cereal products, is located in Northfield, Minnesota. At the present time, Malt-O-Meal uses McDonough for LTL shipments to Mankato approximately twice a week. It anticipates that level of usage to continue regardless of the outcome of this petition. Most of McDonough's business with Malt-O-Meal, both LTL and truck load, is between Northfield and the Twin Cities. Those movements are outside the scope of this

Application. Malt O Meal is pleased with the same-day service that McDonough has provided to it.

33. Faribault Foods is one of McDonough's largest customers. McDonough's trucks operate around the clock for Faribault Foods in the peak canning season (generally June 15 to the last week in September). This vegetable processing company has experienced steady growth, with 1987 (estimated) gross revenues of \$35 million.

McDonough handles approximately 500 to 600 shipments per year for Faribault Foods, most of them during the "peak" season and most of them to points not covered in this Application (the biggest Minnesota destination is Cokato, where the shipper has another plant).

Regarding the proposed expanded service area, McDonough hauls canning products and materials, such as empty cans, to Faribault Foods from Mankato

and handles numerous inter canner shipments (labels, boxes, cans, and goods) between Faribault and processing plants in Rochester, Pldinview, Wells, Lesueur, Montgomery and Dodge Center. Although frequent, the shipments are made on an irregular, as needed basis that intensifies greatly during peak canning time. The amount of such shipping is not quantified on the record.

if this Application is granted, Faribault Foods would continue to use McDonough to the above noted locations, many of which were added for McDonough after the bankruptcy and shut-down of Murphy Motor Freight.

34. Chaska Chemical Company, located in Savage, Minnesota, is a manufacturer of industrial cleaning compounds. Their main customers are institutions and industries such as schools, restaurants, food and canning plants and some paper mills. Regarding the area sought for expanded service by McDonough, Chaska Chemical ships its products in different sized drums, pails and barrels to Albert Lea, Austin, Rochester, Mankato and Waseca. McDonough is used for these shipments approximately twice a week. This shipper considers McDonough's service [a] he "great", especially in emergency situations where it needs same day delivery. McDonough's availability in those situations prevents Chaska Chemical from having to rent a truck to transport its product to wherever it is needed.

Chaska Chemical uses Lakeville for much of its common carrier shipping, but had an incident in 1986 where a Lakeville driver refused to unload drums for a customer in Mabel, Minnesota (a point outside the area sought to be served by McDonough). Another incident with Lakeville occurred in 1985 where that carrier was unable to deliver dish soap to a Country Kitchen in LaCrosse, Wisconsin on the day promised. LaCrosse is also outside the scope of this Petition.

If this Application is granted, Chaska Chemical estimates that its use of McDonough to the area sought for expanded service will increase to approximately twice a week.

35. AJS (Alloy, Tool and Specialty) Steels, Inc., of Roseville, Minnesota is a service center specializing in the tool and steel supply industry. Their

customers are mostly tool and die shops. Regarding the area sought for extended service, ATS currently uses McDonough for shipments to Rochester every two weeks. It considers McDonough's service to be "great".

if this Petition is granted, ATS intends to use McDonough or shipments to Pochesier, Mankato, Belle Plaine, Austin and Albert Lea a to a! of two to three times per week. ATS is cutting back the number of shippers it intends to use throughout Minnesota, and McDonough is one that it intends to retain.

36. CSI (Computer Supplies, Inc.) Business Forms, Inc. of New Hope, Minnesota manufactures stock computer forms and data processing cards. It also produces key punch cards, magnetic tape, diskettes, printer ribbons and Pressure sensitive labels for resale. Four to five percent of the Company's business is in southeastern Minnesota. CSI currently uses McDonough approximately once per month for shipments to Waseca, Mankato and Rochester. McDonough is used quarterly by this shipper for shipments to Lake City, Red Wing and Wabasha. It also uses McDonough for shipments to Owatonna and La Riviere. If this Application is granted, CS anticipates using McDonough at approximately the same level as it does currently, except that it may add an

occasional Red Wing shipment or Wabasha shipment that currently goes to Protestant Hyman.

Like some of the other shippers who are supporting the granting of this Application, CSI wants McDonough to be granted regular route authority so that the shipper knows it will be using a carrier who regularly travels to the points where it has customers.

37. Eagle Fitness Systems of Owatonna is a builder of physical fitness equipment. Eagle uses McDonough for shipments to vendors in the area sought for expanded service several times per week. It uses McDonough for delivering chrome plating and silk screening products and to pick up machine parts. If this Application is granted, the level of service to Eagle Fitness Systems by McDonough will remain about the same. The vendors are located in Waseca, Albert Lea, Kasson and Rochester. Eagle rates McDonough's service as very satisfactory. The product shipped by Eagle to vendors for silk screening and chrome plating is very delicate, and it has had no problems with McDonough's handling of the material.

38. Jostens, Inc., is a nationwide company with many divisions. It has a ring repair facility in Owatonna and a storage facility and distribution center in that city for all the forms that are used in their computer operations around the country. The company is headquartered in Bloomington and has gross revenues of \$580 million per year. Jostens uses McDonough as its common carrier for shipments from approximately 40 to 50 vendors in the Twin Cities area. This shipper is satisfied with McDonough's services.

With respect to the area sought for expanded service by McDonough, Jostens will use McDonough for quarterly shipments from Mankato, shipments two to three times per month from Austin and for a daily shipment of forms between Owatonna and Red Wing, if this Application is granted. McDonough may also be used to transport envelopes and other paper material on a three times per week basis from the Twin Cities to its facility in Red Wing.

39. Omark-HydroAx, of Owatonna, manufactures tree shearing machines and rotary axes. Omark currently uses McDonough on inbound shipments from the Twin Cities of steel and upholstery that go into the vehicles it assembles.

If this Application is granted, Omark will utilize McDonough for the inbound shipment of castings from a company in Mankato. There will be approximately six such shipments per year.

Omark is extremely pleased with McDonough's service, and for the past two years has been using a stamp on its purchase orders that tells vendors to use UPS or McDonough on moves in Minnesota.

40. Images on Metal is a silk screening operation in Kasson, Minnesota. Images on Metal is the silk screening operation used by fagle Fitness Systems, and its present business with McDonough is the inbound and outbound shipment of silk screening for fdgle. These movements occur approximately twice per week, and will continue whether or not this Petition is granted. Since Images on Metal has no loading dock, the company especially values McDonough's service that includes lift gates and power jacks. It rates McDonough's services as "excellent".

41. Austoft, Inc. (USA) is the former Owatonna Manufacturing Company in

Owatonna. The company produces Skidsteer loaders and attachments, as well as buckets and apparatus for certain applications of those units. Austoft currently uses McDonough approximately two times per week to make deliveries to dealers in Red Wing, Lake City, Kasson, Goodhue, Rochester and Wumbrota, as well as deliveries to site locations where parts are needed for broken-down equipment. If this Application is granted, it anticipates using McDonough with the same regularity as it does as present. This shipper rates McDonough's service as "excellent". For interstate shipments to Iowa and Wisconsin, Austoft has decided to replace its former Carrier with McDonough.

42. The King Company of Owatonna manufactures industrial heaters, commercial ventilating systems, coils, air curtains and refrigeration equipment. Many of its shipments are handled on flatbed trailers. It uses McDonough for shipments to the Twin Cities ten to twelve times per week and to Mankato and Waseca an aggregate of approximately twice per month. King expects that level of service to continue whether or not this Application is granted, but it may add shipments to Austin and Albert Lea. The quantity and frequency of such shipments is not specified in the record. This shipper also uses Protestant Hyman twice per week for outbound shipments.

43/ E.F. Johnson Company of Waseca manufactures electronic components and communications equipment. It receives shipments from Vincent Metals of St. Paul, approximately 15% of which are delivered by McDonough. If this Application is granted, its level of service from McDonough is anticipated to remain about the same.

44. Katolight, a manufacturer of generators in Mankato, uses McDonough's service outbound approximately six times per year and inbound, from St. Paul, approximately 3 to 4 times per month. Although Hyman provides regular route service to Mankato, Katolight chooses to use McDonough because its rates are, in fact, better. This shipper rates McDonough's service as "excellent".

45. The Wenger Corporation of Owatonna manufactures equipment for the performing arts, such as chairs, risers, staging, acoustical reflective services and sound isolation rooms, which are sold to schools, colleges, parks and recreation systems and to various government agencies. Wenger utilizes McDonough on shipments from Rochester every 30 to 40 days and from Mankato approximately every 45 days. Wenger rates McDonough's service as "excellent". Wenger uses Protestant Hyman for most of its outbound shipments to the area sought for extended service in this Application. If this

Application is granted, Wenger intends to allow McDonough to bid for that business. Otherwise, it plans to use McDoroug At the same level of service currently utilized. The current level of shipments to the area is sporadic.

46. With respect to the 12 specific routes over which McDonough seeks an extension of its present Regular Route Common Carrier authority, the evidence provided by supporting shippers, as detailed in Findings 19 45, demonstrates the following number of firm shipments to points along those routes, if the Petition is granted (on a monthly basis):

Route (I 35 lo Albert lea) -- 18;
Route 2: (169 between Twin Cities and Mankato) - 20;
Route 3: (to Austin) - 7;
Route 4: (Highway 42 to Rochester) - 48;
Route 5: (Highway 61 to Wabasha) - 20;

Route 6: (Highway 57 from Hader to Kasson) -- 1;
 Route 7: (Highway 14 between Mankato and Rochester) - 90;
 Route 8: (Highways 21 and 13 between Jordan and Albert Lea) - 20;
 Route 9: (Highway 56 and 1 90 from Hampton to Austin) - less than 1;
 Route 10: (Highway 63 from Rochester to Lake City) -- 5;
 Route 11: (Highway 58 from Zumbrota to Red Wing) - 26;
 Route 12: (Highway 22 and 1-90 from Mankato to Albert Lea) 13.

47. Many of the shippers who support McDonough in this proceeding are former customers of Murphy Motor Freight, which recently went out of business.

48. Many of the shippers supporting this Application operate, or have customers that operate on a "Just-In-Time" (JIT) production schedule. Many operations are converting to the concept. JIT operations involve not ordering or storing spare parts and material used in production until just before they are needed in the making of the commodity being produced. This method of operation cuts down on warehousing and inventory expense and, most importantly, allows the business to retain cash as long as possible before purchasing goods used in the production process. This system places a heavy reliance on efficient, dependable transportation of goods used in the production process from warehouses and vendors located elsewhere. If the business (or the supplier) does not have its own trucks, and the product is too heavy for courier-type shipping, common carriers are called upon to fill the transportation need. McDonough's emphasis on timely, efficient service is, in part, a response to the needs of shippers who are shifting to JIT production methods.

49. Many of the supporting shippers in this case expressed a desire that McDonough be granted regular route authority to serve their location, even though McDonough may be able to serve them at the same level now under its statewide irregular route authority. They feel more comfortable with a trucker whose driver is in the vicinity on a daily (or otherwise regular) basis and is familiar with their commodities and their business's own particular needs. Some are reluctant to become more frequent customers of the Applicant when its only authority to serve them is irregular, and some feel (or have been told by various sources) that McDonough cannot legally serve their needs without a grant of regular route authority. A grant of regular route authority would eliminate this ambiguity in the minds of many potential shippers. Also, regular route rates are less than irregular route rates for LTL shipments.

50. Protestant Hyman Freightways, Inc. is one of the largest regular route carriers of general commodities within Minnesota. The company's headquarters are in St. Paul, and its main terminal in Roseville has 120 loading dock doors. Its Regular Route authority is stated in Exhibit 16.

Hyman had revenues of \$61,800,000 in 1986 and anticipates revenues of over \$10 million for 1987. Approximately \$5 million of its 1987 revenues will be from intrastate operations, a growth of 25% from \$4 million in 1986. In the area of south central and southeastern Minnesota currently served by McDonough and proponed for extension in this Application, Hyman had LTL intrastate revenues of approximately \$650,000 during the period between January 1 and June 23, 1987.

in addition to its Roseville terminal, Hyman has agency terminals serving the area prepared for extended service in this case at Mankato, Red Wing, Shakopee, Winona, Hastings, Owatonna and Rochester. Rochester, Red Wing and Owatonna each have two company drivers domiciled in those locations, in addition to the agents' employees.

51. Hyman owns 140 line-haul tractors, 1311 line-haul trailers, 125 pickup and delivery tractors, 87 pickup and delivery trailers and 24 "straight trucks" used in pickup and delivery. All of this Protestant's flatbed trailers are based in Roseville. With respect to the proposed service territory, Hyman's agents have the following equipment at their locations (some of which is company-owned):

Mankato - 4 vans (trailers 4' to 43' in length), 4 "pup" trailers 29' or less in length, 3 tractors and 1 straight truck;
Rochester - 2 vans, 3 pup trailers, 2 tractors and 5 straight trucks;
Shakopee 3 vans, 2 pups, 2 tractors;
Hastings 5 vans, 1 storage van, 2 tractors and 3 straight trucks;
Red Wing 3 vans, 4 pups, 3 tractors and 1 straight truck;
Winona - 1 van, 5 pups, 3 tractors and 2 straight trucks;
Owatonna 3 vans, 5 pups, 10 tractors.

52. In addition to the locations mentioned in Finding 51, Hyman serves all of the communities where shippers who testified in support of this Application are located. It serves Albert Lea, Austin, Winona, Lake City and Wabasha on a daily basis under its regular route authority, as well as its agent-terminal cities.

53. Exhibit 19 is a traffic study introduced by Hyman showing intrastate shipments to, from and within the territory sought for extended regular route service by McDonough. The study examines the period between October 23 and November 30, 1986. During that time, Hyman made 841 shipments, 59 of which took two days or more to complete. The study reflects no same-day deliveries.

54. Hyman is not authorized to provide regular route common carrier service to all of the points sought by McDonough for regular route service in this extension Application. It cannot serve the off-route points of Henderson, Le Center and Cleveland; it has no authority over Highway 22 between Mankato and 1-90, nor over Highway 13 between New Prague and 1-90. It cannot serve points on Highway 3 between Farmington and Faribault; it has no authority on Highway 63 between Lake City and Rochester, nor over 1-35 between Albert Lea and Owatonna. Most of these points are covered in routes 2, 3, 4, 32 and 33 of an Application filed by Hyman in March of 1987 for extension of

its Regular Route Common Carrier Certificate.

55. Hyman presently does business with 19 of the ?I shippers who testified in support of this Application: Katolight, Foldcraft, ALS Steel, VS!, Omark, Faribo Woolen Mills, S- Cohn and Son, Humphrey Elevator, Matejcek, Mercury of Minnesota, Vincent Metals, Eagle Performance Systems, King Company, Wenger Corporation, Josten's, Chaska Chemicals, Plastics Profiles, OMC (Austoft) and E.F. Johnson.

Most of Hyman's growth in the south central and southeastern Minnesota region has been since 1980, following the demise of Witte Transportation Company.

56. Protestant Lakeville Motor Express is another large Minnesota carrier. In 1986, Lakeville had over \$9 million in gross revenues, of which approximately 60% was intrastate (\$5.4 million). Lakeville's Main terminal is at its corporate headquarters in Roseville, a complex which houses its general offices, maintenance area and 54 dock-doors. Within the area sought for extended service by McDonough in this case, Lakeville serves shippers out of Roseville and from agency terminals at Cannon Falls (1 door), Rochester (6 doors), Austin (4 doors) and New Ulm (8 doors). In addition to the Lakeville equipment based at those locations, the agents have tractors (1 at Cannon Falls, 4 at Rochester, 3 at Austin and 5 at New Ulm) that are deployed for Lakeville's use.

57. Lakeville's operating ratio in 1986 was 98 (expenses, before taxes, were 98% of revenues). The CoMadny currently is in an "excess capacity" situation, meaning that it is not getting full usage out of its equipment. This is true system-wide and in the area sought for expansion of authority by McDonough.

be. lakeville makes two peddle runs per day from its Roseville terminal into the area relevant to this Application - one to Northfield, Faribault and Owatonna (already served by McDonough on a regular route basis) and one to Wabasha, via Highway 61 through Red Wing. it also makes road runs between the Rochester, Austin, Cannon Falls and New Ulm agency terminals.

59. Exhibit 25 is the result of an Intrastate Delivery Study performed by lakeville for shipments of freight from the Twin Cities to south central and southeastern Minnesota in the areas of Rochester, Austin Albert Lea, Mankato, Owatonna-Faribault-Northfield and Cannon Falls for the first three months of 1987. The total shipments were 2,552, of which 2,549 (over 99%) were delivered overnight. Approximately 72% of the shipments were to the Rochester, Austin-Albert Lea areas (1842 of 2552). An unknown number of those shipments were of freight destined for points outside the area for which McDonough seeks extended authority in this Petition.

60. With respect to the area within the Application, lakeville can serve all intermediate points between Mankato and Owatonna, via U.S. Highway 14, as well as Rochester on Highway 52. Lakeville does not have authority to serve the smaller communities of Chester, Stewartville, Byron, Kasson, Dodge Center,

Mantorville, Wasioja, Claremont, Havana, Elysian and Medicine Lake. However, Hyman has authority to serve all of the intermediate points lying along Highway 14 between Rochester and Mankato. While Lakeville can serve Jordan and Albert Lea, it does not have authority to serve the small intermediate and off-route points listed in McDonough's Application along Highways 21 and 13 between Jordan and Albert Lea. With respect to McDonough's proposed Route 9, Lakeville does not have authority to serve the intermediate and off-route points between Hampton and Hayfield, with the exception of Kenyon. Of the ten off route points listed on that route, LME does have authority to serve Brownsdale, Sargeant, Waltham and Hayfield. Although Lakeville can serve both Rochester and lake City, it cannot serve the small intermediate and 3 off route points listed on McDonough's proposed Route 10 (U.S. Highway 63). lakeville does not have authority to serve the small intermediate and listed off route points on proposed Route 11 (Minnesota Highway 58) between Zumbrota and Red Wing.

61. lakeville processed loss and damage claims on which it made payment in an average of 17 days in 1986. The amount paid in claims (\$26,130.05) was 0,290 percent of LME's revenues for 1986 (\$9,025,127). The company's ratio of claims versus shipments was .00219 (1 in 457), less than one fifth of the national average.

Hyman attempts to process all of its damage claims to payment within 90 days. Most are completed within 30 days of the claim date. Since it has received no COMPIDINTs specifically criticizing the speed and methodology of its claims processing, Hyman rates itself as doing a good job in that area.

62. Many of the shipments between agency points performed by Hyman and Lakeville are carried on runs back to their Roseville terminals and then placed on trucks going out to the agency which handles the destination point of the freight, rather than being transported directly between the agents' locations. If this Application is granted, McDonough will, in many cases, cut down on this time consuming process by shipping direct from origin to Destination or taking the freight back through Faribault, which is more centrally located in the service territory than Roseville.

63. In addition to Hyman and lakeville, the territory sought for extended regular route service by McDonough is served, at least in part, by the following regular route carriers: Deike, Twin City News, Gross, Quast, Crouse and Century Mercury.

64. Exhibit 13 is McDonough's route card. The card makes no representation that McDonough will provide service to the 58 communities listed on either a regular route or irregular route basis. Further, it announces 'VIRECI SERVICE BETWEEN . . . the communities. Among Prairie, Cannon Falls, Faribault, Hastings, Kenyon, Mankato, New Prague, Northfield, Owatonna, Rochester and Waseca are listed on the card in bold type. McDonough does not have RRCC authority to serve Cannon Falls, Kenyon, Mankato, Rochester or Waseca. At least 21 of the 47 communities mentioned in lower case on the card are located in counties which McDonough lacks current RRCC authority to serve, but all are located in areas sought for extended service in this Application.

PERMISSIBLE STATUTORY-AND REGULATORY EXCERPTS

Minn. Stat. 221.021 (1986) provides:

No person shall operate as a motor carrier or advertise or otherwise hold out as a motor carrier without a certificate or permit in full force and effect. A certificate or permit may be suspended or revoked upon conviction of violating a provision of sections 221.011 to 221.296 or an

order or rule of the commissioner or board governing the operation of motor carriers, and upon a finding by the court that the violation was willful. The board may, for good cause shown after a hearing, suspend or revoke a permit for a violation of a provision of sections 221.011 to 221.296 or an order or rule of the commissioner or board issued under this chapter.

Minn. Stat. 221.071, subd. 1 (1986), in relevant part, provides:

If the board finds from the evidence that the petitioner is fit and able to properly perform the service proposed and that public convenience and necessity require the granting of the petition or part of the petition, it shall issue a certificate of public convenience and necessity to the petitioner. In determining whether a certificate should be issued, the board shall give primary consideration to the interests of the public that might be affected, to the transportation service being furnished by a railroad which may be affected by the granting of a certificate, and to the effect which the granting of the certificate will have upon other transportation services essential to the communities which might be affected by the granting of the certificate. The board may issue a certificate as applied for or issue it for a part only of the authority sought and may attach to the authority granted terms and conditions as in its judgment public convenience and necessity may require

Minn. Stat. 221.011, subs. 9 and 11 (1986) provide:

Subd. 9. "Regular route common carrier" means a person who holds out to the public as willing, for hire, to transport . . . property by motor vehicle between fixed termini over a regular route upon the public highways.

Subd. 11. "Irregular route common carrier" means a person who holds out to the public as willing to transport property from place to place over highways for hire but who does not operate between fixed termini or over a regular route or on regular time schedules

Minn. Rule 7800.0100, subp. 4, provides:

The term 'fit and able' shall mean that the applicant is financially able to conduct the proposed business; that the applicant's equipment is adequate and properly maintained; that the applicant is competent, qualified and has the experience necessary to conduct the proposed business; that the applicant is mentally and physically able to comply with rules, regulations and statutes of the commission.

Minn. Rule 7800.1600 (Regular Route Common Carrier) provides:

subpart 1. Carrying of freight as irregular route common carrier. If a regular route common carrier of freight is also an irregular route common carrier as defined in Minnesota Statutes, section 221.011, subdivision 11, or a contract carrier, as defined in Minnesota Statutes, section 221.011, subdivision 12, it shall not carry freight as a regular route common carrier, and as an irregular route common carrier, or as a contract carrier in the same vehicle at the same time.

Subpart 2. Interchange of freight. No regular route common carrier may interchange freight with an irregular route common carrier or with a contract carrier,

Minn. Rule 800.1100 (Permit Contract Carriers), subpart 2, provides, in relevant part :

Subp. 2. Interline freight. Permit carriers may not interchange freight with another permit carrier or with regular route common carriers

Minn. Stat. 221.011, subd. 14 provides:

'Permit carrier' means a motor carrier embraced within this chapter other than regular route common carriers and petroleum carriers.

Based upon the foregoing Findings of Fact, the Administrative law Judge makes the following:

CONCLUSIONS

1. Any of the foregoing Findings of Fact more properly designated as Conclusions are hereby adopted as such.

2. The Transportation Regulation Board has jurisdiction over the subject matter of the hearing.

3. Proper notice of the hearing was timely given, and all relevant Substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative law Judge.

4. From the Applicant's experience, knowledge of the regulations and financial condition, the Judge concludes that it is fit and able within the meaning of Minn. Rule 800.0100, Subp. 4.

5. The Applicant's vehicles, being regularly maintained and free from defects, are within the safety requirements prescribed by the Department.

6. The Applicant has proven that public convenience and necessity require the granting of an extension of its present regular route common carrier authority to transport general commodities as follows:

Along U.S. Highway 14 to all intermediate and off route points between Mankato and Rochester; along U.S. Highway 52 to all intermediate and off-route points between the Minneapolis St. Paul Metropolitan area and Rochester; and along Minnesota Highway 58 to all intermediate and off route points between Red Wing and Zumbrota.

The routes are listed in the Application as proposed Routes 4 (Highway 52), 7 (Highway 14) and 11 (Highway 58).

1. The Applicant has not proven that public convenience and necessity

require the granting of regular route common carrier authority along the routes proposed for extended authority in this Application which are not specified in Conclusion b, because the demonstrated volume of service along those routes is too low.

8. The service proposed to be offered by McDonough along the routes specified in Conclusion 6 will provide a significant public benefit over existing service in that same day service will be provided and McDonough has readily available specialized equipment, such as flatbed trailers, to accommodate particular needs of shippers along those routes.

9. A grant of extended regular route common carrier authority to the Applicant along the routes specified in Conclusion b will decrease, to some extent, the traffic available to competing common carriers. It will not, however, jeopardize their financial viability so as to affect the availability of necessary transportation service available to the public.

10. A grant of the regular route common carrier authority specified in Conclusion 6 will not have an adverse effect on transportation service furnished by any railroad.

11. In certain of its operations, the Applicant has carried freight as a regular route common carrier and as an irregular route common carrier in the same vehicle at the same time, in violation of Minn. Rule 1800.1600, subp. 1.

12. In certain of its operations, the Applicant has violated Minn. Rule 7800.1/00, subp. 2 by interlining freight carried under irregular route common carrier authority with regular route common carriers.

13. The rule Violations noted at Conclusions 11 and 12 do not merit the Board's sanction at this time within the meaning of Minn. Stat. 221.021 and the Board's Order In the Matter of the ,Petition of Quast_Transfer Inc. , Docket Nos IRCC 310, RRCC 551/MR 86-281; RRCC 515/E 86 443, RRCC Order No. 8 (effective 1/1/88).

14. The Applicant's present level of daily service to the Mankato and Rochester areas, and freight delivery and pickup for entire days in the Austin-Albert Lea area (all areas which it is authorized to serve on an irregular route basis) is of a sufficient volume and frequency to resemble, in some respects, operations that are regular route in nature, The provision of this service does not, however, merit Board sanction at this time within the meaning of Minn. Stat. 221 .021 and the Board's Order In the Matter of the Petition of Quast Transfer, Inc., Docket Nos. IRCC 310, RRCC 551/MR-86-281; RRCC 515/E 86-443, RRCC Order No. 8 (effective 1/1/88).

THIS REPORT IS NOT AN ORDER AND NO AUTHORITY IS GRANTED HEREIN. THE PUBLIC UTILITIES COMMISSION WILL ISSUE THE ORDER OF AUTHORITY WHICH MAY ADOPT OR differ FROM THE FOLLOWING RECOMMENDATIONS.

Based upon the foregoing Conclusions, the Administrative law Judge makes the following:

RECOMMENDATION

It is the recommendation of the Administrative Law Judge to the Public Utilities Commission that it issue the following:

ORDERS

IT IS HEREBY ORDERED that the Applicant's current regular route common carrier authority be extended to add the following routes:

- (d) Between the Minneapolis-St. Paul Metropolitan area and Rochester via U.S Highway 52, serving all intermediate and off route points, including Ortonville, Pine Island Zumbrota, Wamamingo and Cannon Falls;
- (b) Between Rochester and Mankato via U.S. Highway 14, serving all intermediate and off route points including Chester, Stewartville, Byron, Kasson, Dodge Center, Mantorville, Wasioja, Claremont, Havana, Owatonna, Elysian and Madison lake;
- (c) Between Zumbrota and Red Wing, via Minnesota Highway 58, serving all intermediate and off-route points, including Bellechester, Belvidere Mills and Red Wing,

All routes granted for extension as detailed and in the Applicant's existing authority may be needed to provide direct service.

It IS FURTHER ORDERED: that the Applicant shall cease and desist from the commingling of regular and irregular route freight; that the Applicant shall cease and desist from interlining freight carried under regular route common carrier authority with regular route carriers and that the Applicant shall

cease and desist from the transportation of any freight to the Austin and Albert Leavitt in it is except under irregular route common carrier authority.

failure to comply with the terms and conditions of this Order will be considered grounds for the suspension or revocation of the Applicant's irregular route authority.

failure to comply with the terms and conditions of this Order will be considered grounds for the suspension or revocation of the Applicant's irregular route authority.

Dated this day of February, 1988.

RICHARD C. Luis
Administrative law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative law Judge by first class mail.

Reported: typed. (35 lapes). Transcripts Prepared by:
Harold M. Reiner and Allen J. Thiry, Court Reporters.

MEMORANDUM

The term "public convenience and necessity", as contained in Minn. Stat.

221.071 (1986), is not susceptible of a fixed definition that will apply in all circumstances. Quinn Distributing Co. v. Quast Transfer Inc. 288 Minn. 442, 451, 181 N.W.2d 696 701 (1970). It is a question of fact to be determined by the Board. Petition of American Freight Systems Inc. 380 N.W.2d 192, 196 (Minn.App. 1 986 Quinn Distributing Co. v. Quast Transfer Inc.,, supra

The Administrative Law Judge has analyzed the concept of public convenience and necessity in light of three criteria adopted by the Minnesota Public Utilities Commission in In the Matter of GWNCO Transport._Inc,, PC 113/A-81-1107 (October 26, 1982). The GWNCO criteria 'are stated in Petition of American Freight_Systems,_Inc., 380 N.W.2d 192, 194 (Minn.App. 1986). The c r i t e r i a are:

1. A finding that existing service is inadequate.
- s. There is adequate existing service but the proposed new servire would offer additional benefits not presently avdilable to the shipping public.
3. Existing service is adequate but is so unduly concentrated in a single area or a few carriers as to render the public vulnerable to abuses characteristic of absolute monopoly.

The Court of Appeals, in Petition of American FreiAht Systems _Inc,, supra, did not specifically adopt the GWNCO criteria but concluded that under previous case law or those criteri , the decision of the Board denying a grant of authority should be upheld.

The Administrative Law Judge does not consider the criteria listed in GWNCO supra, to be susceptible to a mechanistic interpretation which avoids the necessity of balancing all factors to determine the requirements of public convenience and necessity. He believes that the appropriate legal test for determining whether the grant of an application for regular route carrier authority is required by public convenience and necessity was most properly stated by the Public Utilities Commission in New Ulm_Freight lines, Inc,, RRCC 649/A 15-24, April 24, 1979. The multi-factor test enuciated in that proceeding requires a balancing of the following factors to determine the public interest: public need for the proposed service; the ability of existing carriers to meet that need; the effect on the existing carriers of a

new grant of authority; whether the service offered provides an improvement to the public; whether traffic volumes are sufficient to support an additional carrier; and whether the new service will introduce desirable competition. While the factors enumerated in New Ulm Freight Lines. In;,, supra, largely coincide with the GWNCO criteria, it should be clear that all of the factors to be considered must be balanced and weighed and no single factor is determinative, The Board has recently affirmed these standards of review in In the Matter of the Petition of Morrell Transfer, Inc., Docket No. RRCC 405/E 86 553, Order No. 2081 4 (9/23/87).

The Minnesota supreme Court has held that when service is inadequate, the regulatory authority is required to grant additional operating authority co extensive with the demonstrated deficiency. Quinn Distributing Co. v. Quast Transfer, Inc., supra, 181 N.W.2d at 701 (1970); Munson Drayline v.

Murphy Motor Freight lines 259 Minn. 382, 107 N.W.2d 850 (1961).

McDonough

asserts that it has demonstrated existing service is inadequate because the Protestants are unable to provide same day service in the territory sought for

expanded authority and because it provides storage of reliable freight at any

time. In addition, McDonough argues that its communication system is superior

to that of the Protestants, thus providing a service to shippers in the

territory proposed for expanded authority over and above that which is presently available from existing certificated carriers. In addition,

McDonough asserts that its specialized equipment, such as trailers with 110"-high door openings, automatic lift gates and power jacks, trailer and tiltgate ramps and a larger number of flatbeds available for specialized hauling in the service territory, all of which services are desired by certain

shippers in the territory from time to time, demonstrate further that the service offered by existing regular route carriers is inadequate.

Adequacy of existing service, like public convenience and necessity, is a

fact question incapable of precise definition. The courts have considered adequacy of service in regard to whether traffic available for transportation

is transported satisfactorily on a regular basis. Dahlen Transport, Inc. v.

Hahne 261 Minn. 218 112 N.W.2d 630 (1962); Quinn Distributing Co. v. Quast

transfer, Inc., supra.

The Administrative law Judge concludes that the isolated service complaints against the Protestants in this proceeding do not substantiate a finding that the service they provide is generally inadequate. The Protestants have shown that they usually provide next-day service and satisfactory resolution of customer complaints. Given the volume of traffic

transported by them, some isolated customer complaints and occasional misunderstandings are to be expected. The great majority of shipper witnesses

testifying in this proceeding who have used the services of Hyman and Lakeville indicate that they are satisfied with the Protestants' services and

would use them in the future. The Administrative law Judge is unable to find

that the current service of the Protestants in the territory sought for

expanded authority is unsatisfactory.

The provision by McDonough of same-day service, both in the territory it

now serves under regular route authority and in the area sought for expanded

authority, is, however, a significant improvement for the shipping public in

those areas. The record establishes that the Protestants do not provide such service, McDonough is currently providing that service on 25% of its shipments, and intends to provide it throughout the entire territory to which expanded authority is sought on an as needed basis.

The Applicant's communications system is viewed by the Administrative law judge as superior to that of the Protestants. The principal benefit to the shipping public of McDonough's equipping all their trucks with radios that can communicate with the company dispatcher is that the Applicant can react quickly when service needs arise in the area it serves. The Protestants' systems, of either having a driver complete a run and then call in for messages regarding the return haul, or calling in on timed intervals, simply fail to meet the needs of shippers who discover that they require pickup and/or deliveries anytime after the early afternoon. McDonough can cover such demand due to its communication system. No evidence exists in the record of any certificated motor carrier that serves the territory in question, besides McDonough, who is capable of connecting the driver, dispatcher, consignee and

supplier at one time to coordinate a shipment efficiently. It is concluded that McDonough's communications system provides a proposed new service that offers additional benefits not presently available to the shipping public.

Both Hyman's Traffic Manager and Lakeville's President testified that their companies provided same-day service upon request. However, the traffic studies introduced by those witnesses, covering thousands of shipments in south central and southeast Minnesota, failed to reveal any evidence of the provision of service from a shipper to a consignee on the same day.

The presence in the service territory of readily available flatbed trailers, power lift gates, ramps, and the willingness to transport forklifts on its vehicles to aid the shippers or consignees in loading or unloading of freight also stand as evidence of additional benefits not presently available to the shipping public in the territory into which McDonough seeks expanded regular route service.

The Administrative Law Judge has recommended a grant of extended regular route common carrier authority along some, but not all of the routes McDonough has petitioned for addition to its authority.

The factors of a public need for the proposed service and the ability of existing carriers to meet that need, and whether traffic volumes are sufficient to support an additional carrier, are best addressed, in this case, by the testimony from shippers who supported a granting of this Application. The Judge has attempted to quantify the amount of shipping these witnesses will tender to McDonough if this Application is granted in the area proposed for extended service and along the specific routes for which McDonough has applied for that extended authority. Finding 46 is a summary of that endeavor. It seems clear that the traffic McDonough will be handling along its proposed route 7 (Highway 14 between Mankato and Rochester), along its proposed route 4 (Highway 52 from the Twin Cities to Rochester) and along route 11 (Highway 58 between Zumbrota and Red Wing) is sufficient to establish the public need for regular route common carrier service from the Applicant along those routes. The fact that the Applicant currently carries an extensive volume of freight along those routes that is not being carried by certificated carriers having the authority to travel the same routes stands as evidence of sufficient volume for a granting of regular route common carrier authority to the Applicant along those highways to the points specified.

The amount of demonstrated shipper need along routes 3 (Twin Cities to Austin), 6 (Highway 57 between Hader and Kasson), route 9 (Highway 56 and 1-90

from Hampton to Austin), route 10 (Highway 63 from Rochester to lake City) and route 12 (Highway 22 and 1-90 from Mankato to Albert Lea) are clearly insufficient to support the granting of regular route common carrier certificate authority. Routes 2 (169 between the Twin Cities and Mankato), 5 (Highway 61 from the Twin Cities to Wabasha) and 8 (Highways 21 and 13 between Jordan and Albert Lea), along all of which McDonough will be providing services to the shippers who testified approximately 20 times per month, and route I (I 35 between the Twin Cities and Albert Lea), along which it will provide services to those shippers 18 times per month, are all recommended as routes for which regular route common carrier authority should be denied. The Administrative law Judge has concluded that the demonstrated volume of potential shipping along those routes is too sporadic and irregular in nature to merit an extension to them of the Petitioner's present regular route common

carrier authority. Along the routes recommended for extension, however, it has been concluded that enough business will be generated by shippers who testified in support of this Application to enable McDonough to aggregate LTL shipments and make deliveries along those routes in a profitable fashion.

It has not been shown that the granting of regular route authority along the recommended routes would jeopardize the financial viability of existing carriers to the point where necessary transposition service available to the public would be threatened. The evidence of the supporting shippers, taken as a whole, shows that the amount of business which the Protestants will lose to McDonough if regular route common carrier authority is granted along the routes recommended will be insufficient to jeopardize those carriers' current operating status.

The fact that, in certain of its operations, McDonough has carried freight as a regular route common carrier and as an irregular route common carrier in the same vehicle at the same time (violating Minn. Rule 7800.1600, subp. 1), and the fact that in certain of its operations, McDonough has violated Minn. Rule 7800.1700, subp. 2 by interlining freight carried under irregular route common carrier authority with regular route common carriers, raise issues that are matters of concern in this proceeding. Such activity bears upon the question of whether McDonough is "fit and able" to operate within the meaning of Minn. Rule 7800.0100, subp. 4.

Of further concern is the fact that the Applicant is presently providing services to the Mankato, Rochester and Austin-Albert Lea areas of a sufficient volume and frequency to resemble, in some respects, operations that are regular route in nature.

There is no evidence in the record that McDonough is financially unable to conduct the proposed business or that its equipment is inadequate or improperly maintained. Furthermore, the Applicant is competent, qualified and has the experience necessary to conduct the proposed business. However, the rule violations and conduct of its business in a fashion that resembles the provision of regular route common carrier service in territory for which such service is not authorized obviously bear upon the fitness and ability of McDonough to properly perform the services it proposes in the area of extended

authority.

The Board may consider sanctions against any motor carrier that violates the statute and rules the Board is authorized to administer. In the recent case of In the Matter of the Petition of Quast Transfer Inc Docket Nos. IRCC 310, RRCC 551/MR-86-281; RRCC 515/E-86-443, RRCC Order No. 8 (effective 1/1/88), the Board revoked the irregular route common carrier authority of a carrier against whom violations similar to those committed by McDonough had been proven. However, the Violations committed by Quast Transfer literally dwarf those established on the part of McDonough in this proceeding.

The Administrative Law Judge does not believe that such severe sanctions as suspension or revocation would be appropriate in this case. Minn. Stat. 221.021 (1986), is the Statutory authorization granting the Board the power to suspend or revoke a permit for violation of the provisions of Chapter 221 or any order or rule of the Commissioner of Transportation or the Board issued under Chapter 221. The statute authorizing the imposition of sanctions contemplates, in the opinion of the Administrative Law Judge, a separate

hearing to determine appropriate discipline. Only after due notice and the granting of full due process under Minn. Stat. § 221.021 would sanctions such as suspension or revocation of McDonough's permit for the violations shown in this record be appropriate. This proceeding is limited to a consideration of whether McDonough has established facts necessary to meet the criteria for granting of a proposed extension of its regular route common carrier authority, and is not, of itself, a disciplinary proceeding.

It is appropriate, however, to analyze the violations of statute and rule McDonough has committed, and the extent to which it is acting as a regular route common carrier in areas where it has no authority to so operate. The Administrative law Judge has made such an analysis and concludes that, even if this were an investigatory proceeding, it would be appropriate only to order McDonough to cease and desist from such violative activity. The Board's decision in *In the Matter of the Petition of Quast Transfer, Inc.*, supra, is instructive in this regard for comparison purposes.

On page 29 of the Quast decision, the Board states that to determine whether or not there is good cause for revocation (of, in the Quast case, an irregular route permit) the Board has to consider (1) magnitude of the violations, (2) willfulness of the violations, (3) impact of the violations on the industry and (4) willingness to submit to regulatory authority. In its analysis of the magnitude of Quast's violations, the Board compared such magnitude to that shown in *In the Matter of Murphy Motor Freight Lines Inc.* - Complainant v. HymAn Freightways, Inc., -Respondent, Docket No. 0295-BT, (November 30, 1972) and that shown in Minnesota Department of Public Service, et al., Complainants v. New Ulm Transfer, Inc., and New Ulm Freight Lines, Inc., Respondents, Docket No. c-BT-IRCC and LS 3/16/77 And LS 28454-1 (April 14, 1976). Those decisions set forth in detail criteria to which the Board will look in determining whether a motor carrier's operations are those of an irregular route carrier or a regular route carrier. With respect to

analyzing the magnitude of the violations, the Board pointed out that the New -Ulm and Murphy Cases involved violations of a much smaller magnitude than those in Quast. In New Ulm and Mmurphy, the Board imposed cease and desist orders only.

In Quast, the Board found that the magnitude of the violations involved were over a great geographical area and constituted "serious and substantial violations of the regulatory scheme established by the Legislature". (Quast p. 30)- Violations of that magnitude have not been shown in this case.

Regarding the willfulness of the violations, the Board found in Quast that the violations involved were "intentional and manifest a flagrant disregard to rules and previous orders of the Board". (Quast, at p. 30). The Quast case involved a carrier whose behavior was obviously intentional and occurred after a cease and desist directive to discontinue unauthorized operations had been issued, No such willfulness is evidenced in this case.

The impact of violating rules against commingling regular route and irregular route freight, and against the interlining of freight by an irregular route common carrier with a regular route common carrier, and the impact of operating in a territory as a regular route common carrier without the authority to do so can be quite serious. The Board expressed its deep concerns over such activities at pages 31 and 32 of its recent Quast

decision. Its concerns include the fact that any irregular route carrier with authority to transport general commodities statewide or through large areas of the state could implement regular route operations in the manner that Quast did and attempt to avoid detection by not scheduling peddle runs and not Designating peddle routes. Such widespread violation could encourage other and further Violations of the motor carrier law by irregular route carriers. The Board held that in order to maintain the separation of the motor carrier classes and to assure regular service to the rural, least populous areas of the state, irregular route carriers must not be allowed to siphon off customers of regular route carriers.

The evidence in this case does not show that McDonough has siphoned a great deal of business from existing common carriers. Rather, it is building new business or filling the "vacuums" of business created by the demise of carriers such as Murphy Motor Freight. The service it is providing is frequent enough to appear repetitive in character, but the Administrative law Judge concludes that it is not following a predetermined plan.

In the Murphy v. Hyman case, supra, and in issuing other Orders involving distinguishing between regular and irregular route service, the Board and its predecessors have been guided by criteria originally established by the Interstate Commerce Commission in Brady Transfer and Storage Co., 41 M.C.C. 23 (1947). In an effort to compare McDonough's operations against those criteria, the Administrative law Judge has found that the Applicant's operations reflect a mixture of characteristics, some of which fit traditional regular route carriage and some of which resemble irregular service.

The carriage of aggregated lots of miscellaneous LTL shipments and service to a great number of shippers is characteristic of regular route service, but the evidence fails to show that McDonough is acting in such a fashion for any reason other than the fact that it simply has a sufficient number of orders for shipment to or pickup from the areas served. The Judge is unable to detect a scheme on the part of the Applicant to convert its operations to regular route without authority. The evidence also fails to indicate that the charges to shippers are under regular route common Carrier tariffs. There is no evidence of general solicitation of many shippers or the maintenance of terminals at any point except Company headquarters in Faribault. It is also evident that McDonough varies its routes between Faribault and points such as Mankato, Austin, Albert Lea and Rochester according to where the business is. The Administrative law Judge concludes that its on-call, as demanded and where demanded type service has simply gotten so large that the filling of the demand has taken on characteristics that make the provision of the service

look like the completion of regular routes. McDonough conducts its operations in the territory sought for extended service between numerous points and uses various routes except when economy of operation and expedition dictates the frequent use of particular routes. Such operations are characteristic of a carrier operating under irregular route authority.

it seems clear that McDonough is willing to submit to the authority of the Board. Unlike the carrier's President in Quast, McDonough's resident, Richard McDonough, is a credible witness. His candid admissions on the record regarding comingling of freight and impermissible interlining were impressive. The Administrative Law Judge had the opportunity to observe Mr. McDonough throughout the proceeding, which included hours of intense cross-examination by skilled, experienced counsel knowledgeable in

transportation matters. The Judge concludes that Mr. McDonough is honest, forthright and sincerely committed to compliance with the governing laws and rules. On the numerous occasions when Mr. McDonough stated that he sought clarification of McDonough's practices in this proceeding, his testimony rang true. When McDonough said he will abide by the Board's ruling in this matter, and by the governing principles of the trucking business as he understands them, this finder of fact believes him.

It is not normally a purpose, in determining fitness and ability, to punish the carrier for past unlawful operations.

In New Ulm Freight -Lines-, _Ing,, IRCC 649/A 75-24, p. 30 (1979), the Public Utilities commission stated

. . . [T]he object of determining fitness is not to punish the carrier for past unlawful operation . . . It is to determine the applicant's willingness and ability to conduct the future operations in conformity with the statutes and applicable rules and regulations of the Commission . . .

For the reasons Stated above, it has been recommended to the Board that it limit its present sanctions against McDonough to Orders to Cease and Desist from further violations.

R . C . L .